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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO. 917

ROOFIRE ALARM COMPANY,
Petitioner,

vs.

UNDERWRITER'S LABORATORIES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

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ROOFIRE ALARM COMPANY,
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v.

UNDERWRITER'S LABORATORIES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on October 11, 1966.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Tennessee (Appendix A) is reported as 188 F. Supp. 783. The opinion of the Court of Appeals for the Sixth Circuit (Appendix B) is reported as 284 F. 2d 360. The judgment from which relief is sought on

October 11, 1966 (Appendix C) is not reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

(a) Whether petitioner under F.R.C.P. 60(b) should be relieved from the operation of a declaratory judgment finding respondent was clearly not established for public welfare, since it now appears respondent has obtained tax-exempt status as a corporation testing for public safety.

(b) Whether petitioner under F.R.C.P. 60(b) should be relieved from the operation of a declaratory judgment holding respondent is properly fulfilling the obligation set out in its certificate of incorporation and could arbitrarily refuse to test since it now appears respondent borrowed its corporate purposes as expressed in its Charter, and has obtained tax-exempt status as a corporation testing for public safety.

STATUTES INVOLVED

The material language of the statute which warranted the application for exemption from income tax is found in 26 U.S.C., Section 501 (c)(3), and reads:

"Corporations *** operated exclusively for *** testing for public safety ***"

FEDERAL RULES OF CIVIL PROCEDURE 60(b)

The material language of Rule 60(b) reads as follows:

"On motion upon such terms as are just, the Court may relieve a party *** from a final judgment, order, or proceeding for the following reasons:

"*** It is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment."

STATEMENT OF THE CASE

This case arises out of a request that the Laboratories test and report on the results of testing a basic heat detector on which a patent was granted to the licensor of the plaintiff. Jurisdiction arises out of diversity.

The Laboratories is a non-profit corporation. Its Charter function is testing for public safety. The Charter specifies that the Laboratories shall "publish and circulate the results."

Roofire requested that be done.

The District Court following the opinion in *Underwriters' Laboratories, Inc., v. Commissioner of Internal Revenue*, 135 F. 2d 371, Certiorari denied 320 U.S. 756 (1943), held the Laboratories "could arbitrarily refuse to test any device ***, it is clearly not established for public welfare."

Roofire moved for relief under Rule 60(b) as the Laboratories position has reversed from that of a non-exempt private corporation to that of a public welfare tax exempt corporation granted exemption because it represented in an application it tests for public safety; without emphasis on the fact that it does not publicize its opinions as to items it considers not safe for the public to use.

ARGUMENT

June 3, 1966, petitioner requested the respondent to test the device and give publicity to the results. Making a prospective application of the declaratory judgment respondent declined saying:

> "As you know, this very request has been found by the Court to be without merit in the litigations which you brought against the Laboratories, Roofire Alarm Company vs. Underwriters Laboratories, Inc., 188 F. Supp. 753, (E.D. Tenn. 1959); affirmed 284 F. 2d 360 (6th Cir. 1960)"

It thus clearly appears that the respondent relies on the declaratory judgment petitioner seeks relief against.

The Underwriters Laboratories, Inc., operates the most widely known testing laboratories in the United States. It is sponsored and controlled by the largest association of fire insurance corporations in the United States. Both the laboratories and the insurance associations are presently exempt from income taxes. Both exercise a constructive and helpful function. Both are supreme in their field. Together these two dominate the actions and control the scope of fire protection in the United States. These assertions are elaborately evidenced by the record in the case last referred to, 320 U.S. 756.

The tax exempt status of the Laboratories is of wide public significance in establishing a working rule to heed in the push for exemptions. In a 1966 book, "Associations and the IRS," published by the Chamber of Commerce of the United States, there are discussions on the exemption outlook. The author, George D. Webster, discusses the actions of the respondent. It is referred

to on pages 3 and 41 in some detail.

The most elaborate and clear showing as to the Laboratories action is in "Tax Techniques in Foundations and other Exempt Corporations," by Stanley S. Weithorn. The author has eight different references to the 1943 case, we need not deal with his comments but pages from this authority are set out (Appendix D). They do not support the exemption. Due to the digest system, neither of these authors appear to have been aware of this case, as it is not a tax case.

A similar and related discussion to the same effect appears in New York University 14th Annual Institute in Federal Taxation on pages 23, 27, 44 and 100 (Volume 14).

The advertising power and influence of the Laboratories operations are emphasized in its booklet, "Testing for Safety," filed as an Exhibit to its answer. All devices that meet its test are listed in booklets and in card systems. A charge (minimum of $50.00 per year) is made to continue listing of a device. It shows clearly that a manufacturer whose device is what the Laboratories care to tell the public of becomes a customer who pays yearly for the listing (advertisement) while others who may mislead the public are ignored and this means the public's safety is ignored. No mention is made of any rejected devices tested, no criticism, no appraisal, no advice to the public. These assertions are supported by the record in this case.

(a) The National Fire Protection Association advises the public against the use of devices that the Laboratories does not list. These two and the sponsor of the Laboratories exert a combined trade control.

The collaboration in *Radiant Burners v. Public Gas Light and Coke Company et al*, 364 U.S. 656 (1961) was similar. It centered on the American Gas Association (AGA). There the membership declined to permit use of burners that AGA did not approve. Here the block is created by not listing. This influence over fire protection organizations extends all over the United States. The respondent's booklet explains the scope of its controls.

(b) Not since *Helvering v. Coleman-Gilbert Association*, 296 U.S. 369 (1935) as our search develops, has there been a decision discussing the operations and limits to be observed by those that enjoy income tax exemption. It held charter provisions cannot be negatived. The lower Courts were reversed and the organization held obligated to abide by the terms of its basic setup.

Not only do the facts found in the record filed in *Underwriters' Laboratories v. Commissioner* when before the Court for Certiorari 320 U.S. 756, support our summation; a look at the record in *Roofire Alarm v. Royal Indemnity* in which Certiorari was denied in 1963, 373 U.S. 949, will disclose the wide extent of the controls exercised by these three affiliated organizations.

The Tax Court in 46 BTA 464, the Court of Appeals in an opinion by Judge Minton (later Mr. Justice Minton), a rather scathing opinion, and this Court all three agreed that what the Laboratories did then was not tax exempt.

And now its performance is the same and it has secured exemptions. The efforts that resulted in the exemptions involved an amendment to the law, included a closed Senate Committee session and an inadvertent failure to show that some tests are not publicized.

Three features of this case seem to warrant consideration by this Court:

(1) The appealing statement in *Hammerstein vs. Kelley*, 235 F. Supp. 60 at p. 62:

> "The United States Supreme Court has said very little in this area of exempt charities and there are few clear decisions on it from other courts."

(2) The audacity of the respondent in securing exemption though still functioning as set forth in 135 Fed. 2d 371, that case pointing out that such functions are not exempt; and

(3) If this petition is denied, respondent probably will later plead former judgment setting up the judgment against which relief is sought, and its implied approval.

Surely the relief sought here calls for an application of the rule which grows out of the establishment by Lord Bacon of the Bill of Review.

The Laboratories has elected to give assurances to the Commissioner and did assure the Congressional Committees that it should be exempt because "testing for public safety." It should not cut that obligation short by ignoring a Charter obligation.

Respectfully submitted,

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Attorneys for Petitioner.

Appendix A

[188 F. Supp. 753 (1959)]

ROOFIRE ALARM COMPANY,

v.

UNDERWRITERS' LABORATORIES, INC.

Civ. A. No. 3248.

United States District Court
E. D. Tennessee, S. D.
June 18, 1959.

Action by manufacturer of fire warning device to compel private nonprofit testing corporation to change its standards as to fire warning devices, so that manufacturer's device might be approved. The District Court, Darr, Chief Judge, held that the establishment of standards under which testing corporation would approve products after testing was an internal operation, and corporation's requirement that warning sound of fire warning device continue for at least three minutes at full intensity did not violate any public policy and was not so unreasonable as to justify entry of a judgment compelling corporation to change its standards.

Summary judgment in favor of defendant granted and action dismissed with prejudice.

1. Torts 6

Manufacturer of fire warning device was not entitled to the approval of private nonprofit testing corporation of manufacturer's product as of right, and testing corporation could arbitrarily refuse to even test any device

without necessarily incurring liability.

2. Corporations 393

It is not a function of the courts to interfere with the internal workings of corporations in exercising their discretion within legal limits.

3. Torts. 6

The establishment of standards under which private nonprofit testing corporation would approve products after testing was an internal operation, and corporation's requirement that warning sound of fire warning device continue for at least three minutes at full intensity as a prerequisite to its approval did not violate any public policy and was not so unreasonable as to justify entry of a judgment compelling corporation to change its standards.

John A. Chambliss, Chattanooga, Tenn., for plaintiff.

Miller, Martin, Hitching & Tipton, Chattanooga, Tenn., for defendant.

DARR, Chief Judge.

This is a declaratory judgment suit filed by Roofire Alarm Company, the licensee of a patented fire alarm device, against the Underwriters Laboratories, Inc. Both parties have filed motions for summary judgment, the defendant on broad, general lines and the plaintiff as to whether the defendant is properly fulfilling the obligations set out in its certificate of incorporation. Rule 56(c), Federal Rules of Civil Procedure, 28 U.S.C.A., provides that a judgment shall be rendered provided that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment

as a matter of law. In the present case no genuine issue of fact appears to exist.

The defendant Underwriters' Laboratories is a non-profit corporation organized by and for the stock fire insurance companies of the United States, and one of its functions is to test fire warning devices and make reports on the results of such tests. A portion of the certificate of incorporation, relating to the objects and purposes of the corporation, reads as follows:

> "By scientific investigation, study, experiments, and tests, to determine the relation of various materials, devices, constructions, and methods to life, fire, and casualty hazards, and to ascertain, define, and publish standards, classifications, and specifications for materials, devices, constructions, and methods affecting such hazards, and other information tending to reduce and prevent loss of life and property from fire, crime, and casualty."

The plaintiff alleges that "this charter obligation and the reputation of the defendant have developed an occupation and course of conduct affected with a public interest," and then asserts that the defendant has an obligation to be reasonable with and not discriminate against the plaintiff.

The device of the plaintiff consists of two carbon dioxide filled capsules enclosed in a metal tube with crimped ends. When heated, the capsules explode, thereby warning people in the vicinity. This device was presented to the defendant for testing, and was found not to meet their standards for single station fire alarms. One requirement which this device failed to meet was that "the warning sound continue for at least three minutes at full intensity." Apparently the plaintiff feels that this requirement is unreasonable, and that this Court

should so determine, and require the defendant to change its requirements. This the Court declines to do.

[1] The defendant is not the only testing laboratory available to the plaintiff. Approval by the defendant is not available as of right, and the defendant—or another such laboratory—could arbitrarily refuse to even test any device without necessarily incurring liability. As pointed out in Underwriters' Laboratories v. Com'r of Int. Revenue, 7 Cir., 135 F. 2d 371, the defendant is a business league formed to perform services ordinarily conducted for profit. It is clearly not established for public welfare, but for private gain—not to pay dividends to stockholders, but to benefit qualifying manufacturers and insurance companies (its "stockholders") through reduced fire losses.

[2, 3] By limiting its approval of devices and by directly or impliedly indicating that unapproved devices may be less desirable to buyers of such devices, it has made its approval a desirable and financially rewarding goal. To require it to approve a device, and to lower, or change, its standards would, to some degree, decrease the desirability of the goal. It is not a function of the courts to interfere with the internal workings of corporations in exercising their discretion within legal limits, and the establishment of the standards which are here involved is an internal operation that does not violate any known public policy.

In the present case the defendant examined the plaintiff's device, and declined to accept it for a clear failure to meet the standards set by the defendant. The standards set do not appear to this Court to be so unreasonable as to justify the entry of a declaratory judgment for the plaintiff.

The plaintiff's motion is denied. The defendant's motion for a summary judgment in its favor is granted, and the suit dismissed with prejudice.

Order accordingly.

Appendix B

[284 F. 2d 360]

In The
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(October 19, 1960)

ROOFIRE ALARM COMPANY,
Appellant,

v.

UNDERWRITERS' LABORATORIES, INC.,
Appellee.

Samuel M. Chambliss, Chambliss, Chambliss & Hodge, Chattanooga, Tenn., for appellant.

Jere T. Tipton, Miller, Martin, Hitching & Tipton, Chattanooga, Tenn., and Edward H. Hickey, Bell, Boyd, Marshall & Lloyd, Chicago, Ill., on brief, for appellee.

Before McALLISTER, Chief Judge, and MARTIN and O'SULLIVAN, Circuit Judges.

ORDER.

This is an appeal by plaintiff from an order of the trial court, sustaining the motion of defendant for summary judgment and dismissing the complaint.

For the reasons stated in the opinion of District Judge Darr, adequately expressed, the order of the United States District Court is affirmed. 188 F. Supp. 753.

It is so ordered.

Appendix C

NO. 14,060

In The
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROOFIRE ALARM COMPANY,
Plaintiff,

v.

UNDERWRITERS' LABORATORIES, INC.,
Defendant.

} ORDER

(Filed October 11, 1966)

Before O'SULLIVAN, PHILLIPS and EDWARDS, Circuit Judges.

THIS CAUSE having come on to be heard upon a pleading of the above named plaintiff entitled "Motion To Be Relieved Of Final Judgment," the brief in support thereof, and the brief of defendant in opposition thereto, and upon due consideration,

IT IS ORDERED that said motion may be, and it is, hereby denied.

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

TAX TECHNIQUES IN FOUNDATIONS AND OTHER EXEMPT CORPORATIONS

CHAPTER 9

Organizations Testing for Public Safety

Stanley S. Weithorn

SYNOPSIS

§ 9.01 "Testing for Public Safety" Defined
§ 9.02 Purpose of the Exemption
§ 9.03 Deductibility of Contributions

§ 9.01 "Testing for Public Safety" Defined

I.R.C. § 501(c)(3) exempts from income taxation organizations "organized and operated exclusively for . . . testing for public safety." The Regulations state that the term "testing for public safety" includes "the testing of consumer products, such as electrical products, to determine whether they are safe for use by the general public." Reg. § 1.501(c)(3)-1(d)(4).

§ 9.02 Purpose of the Exemption

Prior to the enactment of the 1954 Code, organizations dedicated to testing for public safety were not specifically exempt from tax so that, if exemption were sought, it was necessary to qualify as a scientific organization.

There have not been any interpretations, either administrative or judicial, involving organizations whose purpose is to test for public safety since the specific incorporation of that category into the statute. Under

the 1939 Code, however, there was one pertinent case, involving an organization sponsored by an association of fire insurance companies, that conducted experiments and studies into the causes of fire and tested the resistancy of different types of materials. The results of these research projects were provided to manufacturers in order to assist them in choosing those materials which were the most fire-resistant. Although a portion of the research costs was borne by the sponsoring fire insurance companies, the bulk of the financing came from manufacturers. The court held that the organization was not entitled to tax exemption, since private rather than public interests were being served. *Underwriters Laboratory, Inc. v. Commissioner*, 135 F. 2d 371 (7th Cir. 1943), cert. den. 320 U.S. 756.

OBSERVATION: A specific exemption for organizations "testing for public safety" apparently was included in the 1954 Code solely for the purpose of overruling the *Underwriters Laboratory* decision.

§ 9.03 Deductibility of Contributions

It is puzzling that organizations engaged in testing for public safety are exempt under I.R.C. § 501(c)(3) since, unlike the case of other organizations described therein (e.g., charitable, religious, educational, and scientific organizations), donations to "testing for public safety" organizations are not deductible as charitable contributions. I.R.C. § 170(c); Reg. § 1.170(c). Thus, it would have been more logical to provide exemption for such organizations under another subparagraph of I.R.C. § 501(c) (e.g., that covering business leagues or even civic organizations) since organizations covered by all other such subparagraphs also are of the type contributions to which are not deductible.

In another case, the Underwriters' Laboratories of Chicago was formed by certain fire insurance companies for research and publicity purposes in connection with fire hazards and risks. It was held not exempt, where its income was derived from fees charged manufacturers for testing apparatus and equipment and approving and publicizing such apparatus and equipment as met those tests. *Underwriters' Laboratories, Inc. v. Commissioner*, 135 F. 2d 371 (7th Cir. 1943), cert. den., 320 U.S. 756.

In connection with *Underwriter's Laboratories*, see Gray, "What is 'Research' for Purposes of Exemption," *Proc. N.Y.U. 5th Biennial Conf. on Charitable Foundations* 233 (1961). In this article, the author states the following, at page 244:

> Under the Regulations research must be carried on for the exempt purpose of the organization in the public interest. What constitutes research has been fairly liberally interpreted in the courts. In the case of scientific organizations, there is a small area of what does not constitute research. However, the Treasury Department has recognized that in many instances a subordinate private interest may be permitted in order to achieve research in the public interest.

It is interesting to note that by virtue of a change effected by the 1954 Code (§ 501(c)(3)) this organization is now exempt as a scientific organization since it is engaged in "testing for public safety."

In 1958, the American Council of Independent Laboratories objected very strongly to this exemption in public hearings before the Ways and Means Committee of the United States House of Representatives, characterizing it as "unfair tax-favored competition," as follows:

> The broad sign of business activity which could be included under "testing for public safety," as now so loosely defined, should be of concern to all persons interested in fair taxation . . . it should be pointed out that the testing of foods, drugs, construction and building materials . . . is certainly equally important in determining whether they are safe for use by the general public. [Hearings before Ways and Means Committee on General Revenue Revision, 85th Cong., 2d Sess., Pt. 2, pages 1744-1750 (1958).]

* * *

§ 32.03[1] Denial or Loss of Exempt Status 32-14

An extreme example of an organization denied exemption because its primary function was for the profitable purposes of its membership rather than for charitable purposes is presented by the factual situation in ***Underwriters' Laboratories, Inc. v. Commissioner***, 135 F. 2d 371 (7th Cir. 1943). There, a corporation (1) conducted research and investigations pertaining to insurance hazards, furnishing its membership with the resultant data, and (2) operated a scientific testing service which charged fees for its work.

NOTE: For a discussion of the 1954 enactment that accorded exempt status to organizations "testing for for public safety" see Chapter 8.

* * *

§ 33.08 Financing of Private Projects

Although a special interest of the donor may be furthered by a foundation, exemption generally will not be granted unless there is a public purpose and others in addition to the donor are benefited. See, e.g., *Mabee Petroleum Corp. v. United States*, 203 F. 2d 872 (5th Cir. 1953); *Best Lock Corporation*, 31 T.C. 1217 (1959). Thus, if the foundation is used as nothing more than the alter ego of the donor, by its fostering of the donor's private projects, it will not qualify for exemption. In this connection, the court in *Underwriters' Laboratories, Inc. v. Commissioner*, 135 F. 2d 371 (7th Cir. 1943), stated: "This does not sound like charity to us. If it is charity, it began at home. It was not the public interest that prompted the establishment of the petitioner."

SUPREME COURT, U. S.
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JAN 30 1957

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956

NO. 917

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Petitioner,

vs.

UNDERWRITERS' LABORATORIES, INC.
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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VS.

UNDERWRITERS' LABORATORIES, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Underwriters' Laboratories, Inc., opposing the petition for writ of certiorari, would respectfully show the Court:

OPINIONS BELOW

The District Court's 1959 opinion is found at page 753 of 188 F. Supp., not at page 783 as stated in the Petition. As stated in the Petition, the 1960 opinion of the Court of Appeals for the Sixth Circuit (App. B. of Petition) is reported at 284 F. 2d 360 and the 1966 Order of the Court of Appeals for the Sixth Circuit denying Petitioner's Motion to Be Relieved of Final Judgment (App. C of Petition) is not reported.

JURISDICTION

The jurisdictional requisites to petition from the Court of Appeals' Order of October 11, 1966 denying Petitioner's Motion to Be Relieved of Final Judgment are set forth in the Petition. This Court lacks jurisdiction, however, of any attempt by petitioner, under the guise of such a Motion, to have this Court do indirectly what it could not do directly—review an Order of the Court of Appeals rendered in October, 1960, over six years ago, by granting the Petition for a Writ of Certiorari.

QUESTIONS PRESENTED

Petitioner's "Questions Presented" are unsatisfactory because they are (i) misleading[1] and (ii) irrelevant.[2]

The "Questions Presented" really consists of one question: Where (i) a case was decided against petitioner by the District Court in 1959 on two independent grounds and was affirmed by the Court of Appeals in 1960, (ii) in September, 1966, almost six years later, petitioner filed in the Court of Appeals a "Motion to Be Relieved of Final Judgment" under Rule 60(b), Federal Rules of Civil Procedure, which attempts to inject most belatedly a wholly irrelevant issue, and the Court denied that Motion on October 11,

[1] They suggest that Respondent has recently obtained a tax exempt status under the Internal Revenue Code. As is clearly indicated in Appendix D to the Petition, respondent has had such a status since 1954 and petitioner specifically referred to that 1954 exemption in its brief to the Court of Appeals in 1960.

[2] The apparent basis of the Petition and the Motion—Respondent's tax status—was not at issue in the original case and is not here.

1966, and (iii) petitioner then filed its Petition for a Writ of Certiorari contesting the 1966 Order on a record consisting almost solely of the published 1959 and 1960 decisions and the self-serving assertions of petitioner in its Motion and brief below, should this Court now review the Court of Appeals' refusal to reopen its 1960 Judgment?

STATEMENT OF THE CASE

As the 1959 District Court opinion points out, Underwriters' Laboratories, Inc. is a non-profit corporation engaged in testing various materials and devices to determine if they meet safety standards established by the Laboratories. Those devices which meet its standards are listed by the Laboratories.

Petitioner is the licensee of a patented fire alarm device consisting of two carbon dioxide filled capsules enclosed in a metal tube with crimped ends. According to the District Court, the capsules explode when heated, thus warning people in the vicinity. The device was presented to the Laboratories and tested. It was found not to meet its standards for single station fire alarms, one requirement of which is that "the warning sound continue for at least three minutes at full intensity."[3]

This Petition is petitioner's third attempt to compel respondent to recognize petitioner's would-be fire alarm device. As the summary record indicates, petitioner contends that the Laboratories, having previously tested petitioner's device and found it not to meet its standards for single

[3] The purpose of such a requirement is obvious. A sleeping person may fail to be aroused by one or two reports or may believe he heard a backfire or other street noise.

station fire alarms, has an obligation to test again the device and to inform the world that the device fails to meet Laboratories' requirements.

The first attempt was in the case of *Roofire Alarm Co.* v. *Underwriters' Laboratories, Inc.* (E. D. Tenn., 1959), 188 F. Supp. 753, *aff'd,* 284 F. 2d 360, in which defendant's motion for summary judgment was upheld. No petition for writ of certiorari was filed. The District Court there held that the Laboratories did not have an obligation to test and report on petitioner's device and that, in any event, the requirements of the Laboratories were reasonable and were not met by petitioner's device.

The second attempt was poorly disguised as a restraint of trade suit, *Roofire Alarm Co.* v. *Royal Indemnity Co.,* 202 F. Supp. 166, *aff'd,* 313 F. 2d 635, *cert. denied,* 373 U.S. 949, 83 S. Ct. 1678, 10 L. Ed. 2d 704, in which defendant's motion for summary judgment was again upheld, the District Judge commenting, ". . . plaintiff's real purpose . . . is to require Underwriters' Laboratories, Inc. to list . . . (the) device in its publications . . ." (202 F. Supp. p. 170).

In June, 1966, petitioner again tried to get respondent to retest the device and report on it. (Petition, p. 4.) Because the device does not meet respondent's standards (Petition, App. A, p. 10, last paragraph), respondent, relying on the holdings of the Courts in the above two cases, refused to go through the useless motions of testing it. Petitioner thereupon for the third time tried to compel respondent to retest it, by filing a motion under Rule 60(b) asking the Court of Appeals to reconsider and reverse its 1960 holdings in the *Underwriters'* case, supra. The ground alleged is that it is inequitable for respondent to rely on the Court opinions, purportedly because of a change in tax status.

Respondent has been exempt from federal income taxes under 26 U.S.C. 501(c)(3) as an organization "testing for public safety," since the 1954 Internal Revenue Code. The statement in the last paragraph of "Statement Of The Case" (Petition, p. 4) that (inferentially, after 1960) "the Laboratories' position has reversed from that of a non-exempt corporation to that of a public welfare tax-exempt corporation," accordingly, is untrue.

ARGUMENT

Petitioner has not attempted to show that its Petition conforms to Rule 19 of this Court because it cannot.

A motion based upon Rule 60(b) is addressed to the sound discretion of the court, *Flett* v. *W. A. Alexander & Co.*, 302 F. 2d 321 (7th Cir. 1962), *cert. denied*, 371 U.S. 841 (1962). That discretion was exercised adversely to petitioner on October 11, 1966. Since the time to petition for a writ of certiorari to review the 1960 judgment ran years ago, this petition can properly request review only of the 1966 order, and not the 1960 judgment. See *Demers* v. *Brown*, 343 F. 2d 427 (1st Cir. 1965), *cert. denied*, 382 U.S. 818 (1965). Indeed, this Court would not grant a petition to review that 1960 judgment. When the time for filing a petition for writ of certiorari has expired, this Court's jurisdiction to grant the petition ceases, *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399 (1923); *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952).

There is not, therefore, nor can there be, any federal question of any significance raised by the Petition. The only question raised is whether this Court should review whether the Court of Appeals abused its discretion by refusing to reopen a judgment it had rendered six years before.

Under Rule 60(b) a court can alter or amend a previous judgment if it is inequitable that the judgment have prospective application. Moore's Federal Practice, 2d Ed., Vol. 7, pages 283, et seq., Sec. 60.26(4), states the principal situation in which the rule has been applied is where an injunction has been granted and the grounds for continuing the injunction no longer exist or the specific rule of law on which the injunction was based has been changed either by a court decision or legislative action. Obviously, neither of these situations is present. No injunction was granted against petitioner forbidding it to apply to respondent at any time to have the device tested. The converse is true. Petitioner seeks, in effect, a mandatory injunction requiring respondent to test the device.

Even if a significant federal question were presented, it would not merit review in this case. Justice Frankfurter discussed certiorari in *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 918 (1950):

> "Pertinent considerations of judicial policy have come into play. A case may raise an important question but the record may be cloudy."

Here the record is more than cloudy; it is virtually nonexistent and consists almost entirely of petitioner's unsupported assertions.

Petitioner has attempted to challenge the prior judgments by suggesting that respondent's tax status creates some sort of judicial question. That status remains the same as it has been since 1954 and as petitioner knew it to be before all of its litigations against the Laboratories.

Moreover, despite petitioner's preoccupation with tax status, this is not a tax case. The 1954 Internal Revenue Code granted petitioner no rights against respondent nor

did it require respondent to test and list a device which did not meet its reasonable requirements.

Petitioner has more than had its day in court. As stated by this Court in *Bullock* v. *South Carolina,* 365 U.S. 292 (1961): "the totality of circumstances as the record makes them manifest . . . (does) not warrant bringing the case here. . . ."

Respondent respectfully submits that the Petition is without any semblance of merit and should be denied.

Respectfully submitted,

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